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IN THE

# Supreme Court of the United States

OCTOBER TERM, 197[illegible]

No. 1095

BORDEN, INC.,

*Petitioner,*

vs.

ICE CREAM DRIVERS AND EMPLOYEES UNION LOCAL 757, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

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### Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated October 26, 1970, is reported at — F.2d — and at 75 LRRM 2481 and 64 CCH Lab. Cas. ¶ 11,238. It is reproduced in full at pages 24-36 of the appendices annexed to the instant petition. The opinion of the United States District Court for the Southern District of New York, dated April 21, 1970, is reported at 312 F. Supp. 549 and at 74 LRRM 3020 and 62 CCH Lab. Cas.

¶ 10,822. It is reproduced in full at pages 13-21 of the appendices annexed to the instant petition and at pages 58a-65a of the appendix before the Court of Appeals.

## Statute Involved

The statute involved is Section 301(a) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a), as amended, 61 Stat. 156, which states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

## Questions Presented

1. In an action by a union to compel arbitration, in which the union moves for summary judgment, and where

(a) there is an all-inclusive arbitration clause, and

(b) the issue sought to be arbitrated is admittedly arbitrable,

is it a valid defense for the employer to assert that the union has forfeited its right to arbitrate because it has picketed or taken strike action?

2. Is there any material issue of fact in this case which would preclude the granting of summary judgment to the union?

## Statement of the Case*

### A. The Dispute in Issue.

Petitioner (hereinafter "Borden") and Respondent (hereinafter the "Union") are parties to a collective bargaining agreement effective May 1, 1968 to April 30, 1971 (R.4a-5a, R.11a, R.23a) (hereinafter the "Agreement"). Section 8 of the Agreement contains the following all-inclusive arbitration clause:

> "Any and all disputes and controversies arising under or in connection with the terms or provisions of this Agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this Agreement which the representative of the Union and the Company have been unable to adjust, shall be submitted to arbitration, at the request of either party, to an Arbitrator selected from a list of Arbitrators to be furnished by the New York State Board of Mediation in each case." (R.7a-R.8a).

The Union's attorney, pursuant to the above-quoted provision, wrote the Chairman of the New York State Board of Mediation on October 24, 1969, as follows:

> "I am writing to you on behalf of Ice Cream Drivers Local Union 757 of 265 West 14th Street, New York City. The Union requests arbitration with the above employer [Borden] of the following issue:

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* Respondent, being dissatisfied with Petitioner's statement of the case, makes this statement pursuant to Rule 40.3. Pursuant to Rules 12 and 40.2 references to pages of the Record are preceded by the letter "R" and are made to pages of the printed appendix before the Court of Appeals. Petitioner's statement of the case contains no references to the Record.

> 'Has the Company violated Section 2(d) and 2(e) of the collective bargaining agreement; if so what remedy or remedies is the Union entitled to?' " (R.42a, R.57a)

The dispute referred to arose out of the closing by Borden on October 3, 1969 of its only ice-cream manufacturing plant (the "Harlem plant") in the geographical area defined in the Agreement as the "area of Local 757."* (R.8a, R.11a). The Union contended that Borden's termination of manufacturing in the area of Local 757 violated Section 2(e) of the Agreement and that Borden's distribution in the "Metropolitan Area," as defined in the Agreement,** of products manufactured outside the Metropolitan Area, violated Section 2(d) of the Agreement (R.7a-R.8a). Sections 2(d) and 2(e) provide in relevant parts as follows:

> "(d) * * * In order to protect the job opportunities and labor standards of all employees in the industry-wide collective bargaining unit and at the same time provide for greater flexibility of the companies covered by this Agreement, the Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement." (R.5a-R.6a).
>
> "(e) The Company agrees for the term of this Agreement not to remove its manufacturing opera-

---

* The area of Local 757 is New York City and Nassau and Suffolk Counties in New York. (Agreement §2(e) (R.6a)).

** The Metropolitan Area includes the area of Local 757, two additional counties in New York and thirteen counties in New Jersey. (Agreement §19 (R.6a-R.7a)).

> tions from the area of Local 757 and to continue to manufacture within the area of Local 757, . . ." (R.6a).

The complaint sought to compel arbitration of the above-described dispute. (R.8a-R.9a).

Borden conceded that:

> "As alleged in the complaint, plaintiff [the Union] and defendant [Borden] have a dispute over the interpretation and enforcement of the contract." (R. 11a).

The District Court found that:

> "The parties concede that the underlying dispute over whether Borden violated sections 2(d) and (e) is encompassed within their agreement to arbitrate and thus arbitrable." (R.61a).

The Mediation Board offered its services pursuant to the Agreement, and an arbitrator was selected to hear the dispute. (R.60a). Borden, however, refused to arbitrate, contending that the Union was on strike. (R.43a-R.44a).

The District Court granted the Union's motion for summary judgment compelling arbitration upon the basis of these uncontroverted facts, and the Court of Appeals affirmed that decision.

It is the Union's position that the only issue relevant to this action is the arbitrability under the Agreement of the above-described dispute, and that such issue must be determined solely upon the above facts. The Court of Appeals agreed with this position and stated:

> "This issue of law here is clearly revealed by the motion papers. Further investigation into the underlying facts is unnecessary to decide this question. The

> merits of Borden's action in closing the Harlem plant, the Union's action in engaging in picketing and in a strike, the Agreement obligations of Borden and the Union under the circumstances and the kindred issues related thereto are questions for the arbitrator." (Petition, p. 32).

The statement of the case in Borden's petition contains many allegations which under the Court of Appeals' opinion are irrelevant to this action. In addition inaccurate statements and issues in dispute are stated as facts without citation to the Record and without support in the Record. Because of this, it is necessary to refer, without in any way conceding the relevancy of Borden's allegations, to the following facts as set forth in the Record.

**B. Background to the Dispute.**

The Union represents ice cream manufacturing and delivery employees. (R.4a). The dispute in issue was precipitated by Borden on August 25, 1969, when it announced to the Union its unilateral decision to close the Harlem plant and to dismiss hundred of employees with many years of seniority. (R.25a, R.47a). The Union immediately notified Borden of its position that such action would violate Borden's specific contractual commitment "... to continue to manufacture within the area of Local 757" for the duration of the Agreement. (R.47a-R.48a, R 54a).

Meetings between Borden and Union representatives during the month of September, 1969 failed to resolve the dispute. (R.26a, R.48a).

On October 1, 1969, Borden sent a telegram to the Union stating that the "single issue" involved was "the company's right to go out of business." Borden demanded arbitration

of "this question", and offered to "cooperate in every way possible to expedite the arbitration to resolve this issue within the time limits." The "time limits" demanded by Borden in this October 1, 1969 telegram was that the issue be finally resolved prior to the ". . . plant closing on October 3, 1969." (R.37a).

This "issue" was irrelevant to the real issue in dispute. Borden was not threatening to go out of business, and Borden has not gone out of business. It is not disputed that Borden is one of the country's largest corporations and remains actively engaged in various lines of business including the sale and manufacture of ice cream. (R.49a). It is the Union's claim that Borden continues to sell and distribute within the Metropolitan Area ice cream manufactured elsewhere. (R.7a)

The Union repeatedly has pointed out that the real issue in this dispute concerns Borden's contractual commitment ". . . to continue to manufacture within the area of Local 757. . . ." (R.49a). An additional but related issue is the sale and distribution by Borden, subsequent to the closing of the Harlem plant, of the Metropolitan Area of ice cream products manufactured outside the Metropolitan Area in violation of Section 2(d) of the Agreement. (R.49a).

The Union responded on the same day to Borden's October 1, 1969, "offer" to arbitrate the "single issue", by offering ". . . immediately to discuss with you all issues which may be appropriate for arbitration and to establish sensible procedures for their hearing and determination." (R.55a). The parties met to discuss arbitration on October 1, 2, and 3. The Union requested that the plant be kept open and that the dispute be arbitrated promptly without

conditions. (R.26a-R.27a, R.50a-R.52a). Borden insisted that time limitations be placed upon the arbitrator and the parties and that the issue be defined in the distorted manner above described. (R.26a, R.49a).

Borden's final answer, given on October 3, with reference to the Union's proposal to arbitrate while the plant was kept open without the imposition of artificial time limits was "no dice". (R.52a).

Borden asserts as fact but without citation to the Record that,

> " . . . the Union struck Borden at 3:00 P.M. on October 3, 1969. . . . On October 6, 1969, the Monday following the closing, the Union struck *all* Borden ice cream production and distribution facilities throughout the 757 area. . . .
>
> • • •
>
> The strike continued while the case was being argued in the Second Circuit although the picketing ceased prior to argument." (Petition, pages 6-7) (emphasis in original).

The facts are (1) that the Union has at all times denied Borden's allegation of a strike and has contended that its members were locked out; (2) that this factual dispute has not been resolved; and (3) that the Record is devoid of any allegation of a strike or picketing while the present action was before the Court of Appeals.

Borden alleged a strike in its counterclaim (R.11a). This allegation was denied in the Union's reply (R.13a.) and in the Union's papers in support of its motion for summary judgment. (R.17a) Borden conceded that the Union contended from the first days of the dispute that Borden's action was an

illegal lockout. (R.25a-R.29a). The District Court held that whether or not there was a strike was a question for the arbitrator and did not make any finding on that issue. (R.61a-R.62a.) The Court of Appeals recognized that "the Union alleges a lockout . . ." (Petition, p. 28), referred to "the alleged strike" (Petition, p. 31), and left further inquiry into the matter to the arbitrator. (Petition, p. 32). There is no factual basis for Borden's conclusory statement that the Union has been and is on strike.

Borden also asserts as fact, again without Record citations, that:

> "*At Borden's request*, almost continual negotiations took place in regard to the proposed closing and the problems incidental thereto." (Petition, page 6) (emphasis added).

The affidavit of Stanley J. Brockman submitted by Borden to the District Court states, however, that:

> "The Union responded on the same day [October 1 1969] by telegram, the full text of which is attached and marked Exhibit D, in which it proposed that the Company and the Union meet to discuss issues which may be appropriate for arbitration and establish procedures for their hearing and determination.
>
> Representatives of the Union and Company did meet on the evening of October 1, October 2 and October 3, 1969." (R.26a)

Borden also asserts as fact, again without citation to the Record, that:

> "On October 1, 1969 Borden proposed an immediate arbitration of the disputed issues and offered to keep the facility open and operating during the

> pendency of the arbitration and abide by the decision of the arbitrator." (Petition, page 6).

The Record shows, however, that the Union and not Borden sought to maintain the status quo pending arbitration. Mr. Brockman's affidavit states:

> "During these negotiations the Union took the position that it would be willing to arbitrate the issue of whether the Company had the right to go out of business so long as the Company maintained the status quo by not closing the Fifth Avenue Plant." (R.37a).*

Borden stated only that it "would consider" the Union's request to preserve the status quo. (R.39a)

It is the Union's position, as stated above, that the District Court and the Court of Appeals properly declined to resolve issues which the parties reserved for the arbitrator and that Borden's statement of the case improperly relies upon irrelevant allegations. In any event, it is clear from the Record that Borden's statements are nothing more that conclusory allegations which have no basis in fact.

## Summary of Argument

It is the Union's position that there is no basis for granting certiorari herein and that the District Court properly granted summary judgment because there are no issues of material fact.

The argument which follows is divided into two parts. The Union contends in the first part of the argument that certiorari should be denied because the decisions of the courts below foster peaceful settlement of labor disputes

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* The Union did not agree to change the issue to the form proposed by Borden (R.50a), but that question is not relevant since Borden has refused to arbitrate any issue.

through arbitration pursuant to principles established in decisions of this Court from *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) and the *Steelworkers Trilogy*, 363 U.S. 564, 363 U.S. 574, 363 U.S. 593 (1960) through *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970).

The Union contends in the second part of the argument that under applicable decisions of this Court summary judgment compelling arbitration was appropriate because the papers before the District Court established conclusively that the dispute sought to be arbitrated was arbitrable under the Agreement between the parties.

## ARGUMENT

### POINT I

**The decisions of the District Court and the Court of Appeals conform to applicable law and decisions of this Court, and there are no reasons why certiorari should be granted.**

**A. Applicable Decisions.**

The Court of Appeals found the decision of the District Court compelling Borden to arbitrate to be in conformity to this Court's decisions in *Local 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) and *Drake Bakeries* v. *Local 50, American Bakery & Confectionary Workers International*, 370 U.S. 254 (1962). (Petition, pages 30-32). As shown by the District Court (R.62a-R.64a), there are no material factual distinctions between the present case and *Needham*.

Applicable decisions of other Courts of Appeals are in accord. See *G. F. Wright Steel & Wire Co.* v. *United*

*Steelworkers*, 346 F.2d 928 (1st Cir. 1965); *Trailways of New England Inc.* v. *Amalgamated Assoc. etc.*, 343 F.2d 815 (1st Cir. 1965); *Minnesota Joint Board* v. *United Garment Manufacturing Co.*, 338 F.2d 195 (8th Cir. 1964). Borden has cited no conflicting decision of any Court of Appeals, and there are none.

Borden does not dispute that the decision of the Court of Appeals is fully in accord with the applicable principles of law and decisions. Accordingly, it asks this Court to "reconsider" its holdings in *Needham* and *Drake Bakeries* ". . . in light of this Court's recent holding in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)." (Petition, page 9).

The Court of Appeals found *Boys Markets* to be consistent with *Needham* and *Drake Bakeries* and rejected Borden's contention. (Petition, page 32). Borden argues, however, that:

> "It is apparent that the decisions of both the District Court and the Second Circuit are grounded in the philosophy that a union can strike in violation of a no-strike clause over an arbitrable issue and simultaneously invoke the power of the courts in compelling arbitration. Such a judicial axiom renders the *quid pro quo* equation stated in *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) meaningless and has an effect contrary to the recent decision of this Court in *Boys Markets*, which restored the impact of the *quid pro quo* enunciated in *Lincoln Mills*." (Petition, page 9).

Notwithstanding Borden's conclusion as to the "philosophy" of the Courts below, the purpose and effect of their decisions, as stated by the Court of Appeals, was, consistent

with *Boys Markets*, *Needham* and *Drake Bakeries*, to reaffirm ". . . the benefits intended to be conferred on the employer-employee relationship by resort to the arbitrational process." (Petition, page 32).

**B. The Boys Markets Decision.**

This Court's decision in *Boys Markets* was,

> "'a narrow one' and affirmed an order of the District Court granting injunctive relief hitherto seemingly barred by *Sinclair*." (Petition, page 32)

The decision permits an employer (1) who seeks to arbitrate a dispute, and (2) who can show an equitable need therefor, to obtain an injunction against a strike in breach of contract over such dispute. This Court stated:

> "Our holding in the present case is a narrow one.
>
> • • •
>
> 'Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . .'
>
> In the present case there is no dispute that the grievance in question was subject to adjustment and arbitration under the collective bargaining agreement *and that the petitioner [employer] was ready to proceed with arbitration at the time an injunction against the strike was sought and obtained.*" 398 U.S. at pp. 253-254 (emphasis added).

*Boys Markets* did not purport to remove any disputes from arbitration. Per contra, it preserved the jurisdiction of the arbitrator where the party seeking the aid of the court was willing to arbitrate under the contract. *Drake Bakeries* similarly preserved the jurisdiction of the arbitrator by requiring an employer who agreed to arbitrate the merits of alleged

strikes in breach of contract so to arbitrate. *Needham* accomplished the same purpose by requiring an employer, who wanted to use a union's illegal strike to avoid arbitration, to arbitrate the merits of both the underlying dispute and the strike.

Under *Boys Markets* the jurisdiction of the arbitrator under *Needham* and *Drake Bakeries* remains the same, and the parties are provided with equitable relief ancillary to arbitration, not in derogation of arbitration. Borden now asks the Court to apply *Boys Markets* to defeat the jurisdiction of the arbitrator by approving its refusal to arbitrate a dispute concededly arbitrable under the Agreement.

Unlike the petitioner in *Boys Markets* Borden is the recalcitrant party to the arbitration agreement. This action does not involve an employer's right under *Boys Markets* to enjoin an illegal strike as an aid to arbitration or a union's right to enjoin an illegal lockout as an aid to arbitration. Neither party has sought such relief.* Borden seeks only to avoid arbitration. What is involved is the Union's right to compel arbitration. That right was determined in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957), and has been reaffirmed in subsequent decisions of this Court, including *Boys Markets*.

> "As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. See *Textile Workers Union* v. *Lincoln Mills*, *supra*, at 455." 398 U.S. at pp. 247-248.

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* As has been shown (page 10, *supra*), it was the Union here which sought to preserve the status quo pending arbitration.

It is illogical for Borden to argue, as it does here, that because a strike can be enjoined, the Union is precluded from arbitration. If there is a strike in breach of contract now going on, as Borden claims without proof in the Record, Borden can today, under *Boys Markets*, apply for injunctive relief. It cannot, however, avoid arbitration. Indeed this Court established in *Boys Markets* that as a condition precedent to such relief the employer must agree to arbitrate.

The decision of the Court of Appeals is in conformity to decisions of other courts of appeals on the same matter and to applicable decisions of this Court; it involves a question of arbitrability under federal law already settled by this Court; and it does not depart from the accepted and usual course of judicial proceedings. There is no basis for review on writ of certiorari.

## POINT II

**The District Court properly granted summary judgment compelling arbitration because it was uncontroverted that the dispute sought to be arbitrated was arbitrable.**

This Court has described the judicial function in actions to compel arbitration as follows:

> "It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America* v. *American Manufacturing Co.* 363 U.S. 564, 568 (1960).

Borden conceded that:

> "As alleged in the complaint, plaintiff and defendant have a dispute over the interpretation and enforcement of the contract." (R.11a)

The District Court found:

> "The parties concede that the underlying dispute over whether Borden violated sections 2(d) and (e) is encompassed within their agreement to arbitrate and thus arbitrable." (R.61a)

The above facts being uncontroverted upon the motion papers, summary judgment compelling arbitration was appropriate. The same would have been true even if Borden had not conceded arbitrability. The Agreement's arbitration clause is broad, and the dispute in issue directly involves specific sections of the Agreement. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Borden argues that summary judgment was not appropriate:

> "Borden further contends that the existence of genuine issues of material facts presented by the pleadings and the affidavits submitted to the District Court precluded Summary Judgment and required a hearing.
>
> Borden contended that the Union was on strike, the Union contended it was locked out. * * *
>
> Borden also contends three other issues of fact involving the Union's tactics in attempting to utilize its strike power and at the same time compel arbitration bar Summary Judgment." (Petition, page 11).

The "three other issues of fact" are not identified.

Taken at best, Borden's contention is that the Union's alleged illegal strike and initial refusal to arbitrate released Borden from its obligation to arbitrate. (Petition, page 10). The contention is without merit (1) upon the present

Record, and (2) even upon the assumption that Borden could prove at trial an illegal strike and initial refusal by the Union to arbitrate.

1. As shown in the Statement of the Case, *supra*, the Union has at all times insisted upon arbitration, and there is a dispute as to whether the Union struck or was locked out or whether there was both a strike and a lockout. The existence of such dispute does not preclude arbitration, but requires instead that the dispute itself be resolved by the arbitrator. *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International, supra.*

2. Even if Borden could prove at trial that the Union struck in violation of the Agreement and refused an initial offer by Borden to arbitrate, Borden would not be relieved of its duty to arbitrate. As shown by the District Court (R.62a-R.65a), the facts would then be the same as in *Local 721, United Packinghouse Workers* v. *Needham Packing Co., supra*, in which this Court ordered the employer to arbitrate. Borden's argument that this case involves "... a fundamental and long-lasting change in the relationship of the parties prior to the Union's demand for arbitration" sufficient to distinguish *Needham* (Petition, page 10) is unfounded. The only "change" present in the instant case and absent in *Needham* is Borden's closing of the plant, *i.e.*, the act which gave rise to the instant dispute. Borden should not be permitted to defeat arbitration because of its own breach of the Agreement .

Under the controlling decisions of this Court and upon full consideration of "the policy of our national labor laws" (*Textile Workers of America* v. *Lincoln Mills of Alabama, supra* at 353 U.S. 456) there are no material issues of fact which could preclude summary judgment.

## CONCLUSION

**For the foregoing reasons, the instant petition should be denied.**

Respectfully submitted,

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